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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM 1979  
No. 79-268

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FRANK STEARNS GIESE,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,  
AMICUS CURIAE, IN SUPPORT OF THE PETITION  
FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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INTEREST OF THE AMICUS\*

For 54 years, the American Civil Liberties Union has devoted itself exclusively to protecting the fundamental civil rights of the people of the United States. Foremost among those rights, and

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\* The parties have consented to the filing of this Brief. Their letters of consent have been filed with the Clerk pursuant to Rule 42(1) of the Rules of this Court.

preservative of all the others, is the right to "freedom of speech, and of the press," guaranteed by the First Amendment. Not only have we vigorously argued that the First Amendment protects the interest of individuals in free expression, but the ACLU was perhaps the earliest, and strongest, proponent of the view that the core value protected in the First Amendment is the protection of the free flow of information for robust discussion of public affairs.

The ACLU has appeared frequently before this Court in First Amendment cases, usually on behalf of parties whom our attorneys represent directly and sometimes through the filing of briefs amicus curiae.

Rarely has the ACLU filed a brief amicus curiae in support of a Petition for Certiorari. Nevertheless, the facts of this case, the government's substantial infringement of First Amendment rights, and the dangerous precedent established by the majority opinion below compel us to depart from our long-standing practice.

The petitioner here, Dr. Frank Stearns Giese, a 58-year-old university professor and bookseller in Portland, Oregon, was indicted and convicted of conspiracy to bomb two military recruiting centers in Portland during the early 1970s. Virtually the sole evidence presented against Dr. Giese pertained to a book entitled From the Movement Toward Revolution, a book which was neither authored nor sold by Dr. Giese but which contained his fingerprints on four of the pages.

At trial, the government was allowed to introduce the book into evidence. The prosecution thereafter required Dr. Giese to read inflammatory passages of the book to the jury, and the prosecution commented extensively during closing argument on some of the ideas in the book. In short, the government imputed the ideas in a book to Dr. Giese.

Dr. Giese's conspiracy conviction was affirmed by a divided panel of the Ninth Circuit. Judge Trask wrote for the majority, Judge Sweigert concurred, and Judge Hufstedler dissented.

At the outset of her lengthy dissent, Judge Hufstedler stated that Dr. Giese was "convicted of conspiracy by book association in egregious violation of the guarantees of the First Amendment." A.66; 597 F.2d at 1201. The ACLU is in complete agreement. If the First Amendment means anything, it allows us to read books without their ideas being imputed to us by the government.

After the Ninth Circuit denied a petition for rehearing en banc, Judge Ely took the unusual step of filing a brief dissenting statement. In his view, the majority decision "constituted an impediment to the intellectual growth of our citizenry." A.94; 597 F.2d at 1213.

Because the government engaged in an "egregious violation of the guarantees of the First Amendment," and because the majority's decision below constitutes "an impediment to the intellectual growth of our citizenry," the ACLU has decided to take the unusual step of filing this Brief Amicus Curiae in Support of the Petition for a Writ of Certiorari.

#### STATEMENT OF THE CASE

Petitioner, Dr. Frank Stearns Giese, is a professor of French at Portland State University and the owner of a bookstore, the Radical Education Project Bookstore. In 1974, at the age of 58, Dr. Giese was indicted with four other individuals for allegedly committing direct acts and participating in a conspiracy to bomb two military recruiting centers in Portland, Oregon.

After trial, Dr. Giese was acquitted of all substantive charges. He, however, was convicted of conspiracy. The Ninth Circuit, in a split decision, affirmed his conviction. A.1-A.94; 597 F.2d 1170 (9th Cir. 1979).

#### The Trial

The government's case against Dr. Giese rested heavily on the ideas contained in a book that he didn't even sell at his bookstore, on his forced reading to the jury of passages from the book, and on the prosecutor's commentary on the book.

The book, From the Movement Toward Revolution, was edited by Stanford Professor Bruce Franklin and published in 1971. A.29 n.17; 597 F.2d at 1186 n.17. A copy of the book was found by the FBI in a San Jose, California, apartment maintained by several of Dr. Giese's alleged co-conspirators. A.28; 597 F.2d at 1185. It was introduced into evidence as Government Exhibit C-49, along with other books and pamphlets which also were admitted into evidence. A.28, A.68; 597 F.2d at 1185, 1202.

The writings that were introduced into evidence were offered to substantiate both the substantive offenses and the conspiracy. In his opening Statement, the prosecutor remarked that the evidence would include "'books, literature and paraphernalia or pamphlets which relate to the use and manufacture of explosive devices and the use and acquisition of firearms.'" A.69; 597 F.2d at 1202.

Of all the writings introduced into evidence, the government connected only one to Dr. Giese. A.70; 597 F.2d at 1203. The one was From the Movement Toward

Revolution. A.70, A.80; 597 F.2d at 1203, 1207. Dr. Giese's fingerprints were on pages 146, 166, 167 and 168 of the book. A.29 n.17, A.71; 597 F.2d 1186 n.17, 1203. The government's expert witness testified that he did not know when the prints were placed on the book but that it could have occurred sometime within the previous seven years. Id.

Dr. Giese testified in his own defense. He described his academic and political background, and he explained his participation in non-violent demonstrations on behalf of civil rights and against U.S. involvement in Viet Nam. A.36, A.72; 597 F.2d at 1189, 1204. He denied supplying any books or pamphlets to his alleged co-conspirators. A.34; 597 F.2d at 1188. In order to rebut implications that his bookstore carried how-to books and pamphlets about making bombs and explosives, Dr. Giese testified that none of the books and pamphlets introduced into evidence by the government was carried or sold by his book-

store. A.72; 597 F.2d at 1204.<sup>1/</sup> He also described a "'representative sample'" of the books that he did carry in his bookstore. A.34-35, A.72-73; 597 F.2d at 1188-1189, 1204.<sup>2/</sup>

Among the books which Dr. Giese did not carry in his bookstore was From the Movement Toward Revolution. A.41 n.25; 597 F.2d at 1191 n.25. He nonetheless believed that he owned a copy of the book which he had purchased from J.K. Gill, the largest commercial book seller in Portland. A.41-42 n.25; 597 F.2d at 1191 n.25.

On cross-examination, the prosecutor focused almost exclusively on From the Movement Toward Revolution. Asked if he had read the book, Dr. Giese said that

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1. Among the writings introduced into evidence by the government were The Underground Bombing Manual, Firearms and Self-Defense, Department of Army Manual: Electronic Blasting Equipment, and Communist Guerilla Warfare in the U.S.A. A.72; 597 F.2d at 1204.

2. Among the books commented on by Dr. Giese were Engels, Dialectics of Nature; Cleaver, Soul on Ice; Jackson, Soledad Brother; Greene, Viet Nam; and three books edited by Dr. Giese. A.34-A.36, A.73; 597 F.2d at 1188-1189, 1204.

he had "read snatches of it." A.42 n.26, A.73; 597 F.2d at 1191 n.26, 1204. Asked if he had ever given the book "or one like it" to any of the alleged co-conspirators, Dr. Giese replied that he had not. A.42-A.43 n.26, A.74; 597 F.2d at 1191-1192 n.26, 1204. Then, over objection, the prosecutor asked Dr. Giese to read aloud to the jury portions of the book. A.42-A.44 n.26, A.74-A.75; 597 F.2d at 1191-1192, n.26, 1205.<sup>3/</sup>

3. After the continuing objection was overruled, the cross-examination proceeded as follows:

The Court: "You may have a continuing objection. Please proceed."

A. "You want me to read it aloud? 'We are sorry to hear that the townhouse forever destroyed your belief that army struggle is the only real struggle. That places us in a unique position because, as Che stated, "armed struggle is the only solution for people who fight to free themselves" and we have lost dearly-loved comrades.'

"Do you want me to go on?"

Q. "Yes, sir."

A. "'Also probably every experienced revolutionary has, but we realize that risks must be taken, some will die, others will replace them or us.'"

Q. "Will you continue to the end of that paragraph."

In his closing argument to the jury, the prosecutor summarized and read from the books the government had introduced into evidence. From the prosecutor's perspective, the alleged co-conspirators had acted out the ideas contained in the books. A.75-A.76; 597 F.2d at 1205. After connecting the books with various of the alleged co-conspirators, the prosecutor turned to From the Movement Toward Revolution and Dr. Giese. He told the jury:

"In California as regards Mr. Giese, we have From the Movement Toward Revolution, Mr. Giese has fingerprints on this particular book. He

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A. "I am trying to make sense out of that sentence. All right. 'Others will replace them or us like people rapping about ending racism, colonialism, sexism and all of the other pigisms, exploitation and all that but these things can only be ended by revolution and revolution is in the final analysis armed struggle, revolution is violence, revolution is war, revolution is bloodshed. How long have different successful national liberation fronts fought before they have won large popular support.'"

A.42-A.43 n.26, A.74-A.75; 597 F.2d at 1191-1192 n.26, 1205.

told you that he had one of these books himself, possibly, at home. He could not recall how or if at all his fingerprints got on this particular book which came out of the Debra Sue Apartments in California.

"This is an architectural manual, basically, of urban warfare. Between this book and this book, you have the makings for any sort of urban warfare that you would like to participate in.

"This is basically a conspiracy idea, and I would like to just very briefly take excerpts from pages which contain Mr. Giese's fingerprints. 'A revolutionist sees death as a national phenomenon, must be ready to kill to change conditions. Revolution is armed struggle, violence, war, bloodshed and the duty of a revolutionary is to make revolution.

"Let's all try to pick targets with more care and planning. The object

is to destroy the economy like bombing sites which will affect the economy the most, rip off weapons and money, sniping attacks.

Remember, in a revolution, one wins or dies. The stakes are very high.

"Do you recall the old words, 'Ask what you can do for your country,' destroy it, mentally, morally, psychologically and physically destroy it. And whatever you do do it good.'

"Now those are just two pages from this book but these are two pages which contain the fingerprints of Frank Giese. If you have an opportunity, you may want to leaf through the rest of the book, because, as I indicated, this tells you--this is another how to do it for urban warfare."

\* \* \*

"Did we make up Frank Giese's fingerprints on the book From the Movement Toward Revolution?...You read those pages. It talks about bombing, sniper attacks. You read that book. You read other pages

throughout there. Look at Page 51, for instance, look at the preface. Throughout that book are references to the very thing that these people did."

A.77-A.78; 597 F.2d at 1206.

The prosecutor did not stop with imputing the ideas in a book to Dr. Giese. He also characterized Dr. Giese as "sick," "a wolf in sheep's clothing," and a "very dangerous individual." He stated that a confession inadmissible against Dr. Giese was "one of the more significant pieces of corroboration" against Dr. Giese. And he claimed that Dr. Giese failed to present exculpatory evidence which an innocent man would have presented. A.60, A.88-A.93; 597 F.2d at 1199, 1210-1213.

Although Dr. Giese was acquitted of all substantive charges, he was convicted of conspiracy.

#### The Ninth Circuit's Split Decision

The Ninth Circuit, with Judges Trask and Sweigert in the majority and Judge

Hufstedler dissenting, affirmed Dr. Giese's conspiracy conviction. A.1-A.94; 597 F.2d 1170.

The majority and dissenting opinions focused almost entirely upon the prosecution's use of From the Movement Toward Revolution against Dr. Giese. As the majority conceded, the book "played an important role at trial." A.32; 597 F.2d at 1187.

On appeal, Dr. Giese had argued that it was reversible error for the book to be admitted into evidence, for the prosecutor to compel Dr. Giese to read excerpts from the book, and for the prosecutor in closing argument to associate the ideas in the book with Dr. Giese. The majority upheld the government's use of the book and its ideas. Judge Hufstedler disagreed.

In the majority's view, "From the Movement Toward Revolution had a great deal of probative value [because it indicated] that Giese associated with the other defendants and the unindicted co-conspirators, thereby affording him an opportunity to enter into an agreement with them." A.32; 597 F.2d at 1187.

In Judge Hufstedler's dissenting view, conspiracy cannot be established through a book. "The evidence only proved that the persons who handled the book had been associated with the book .... There was no evidence from which an inference could arise that the persons whose prints appeared handled the book in the company of one another. The proof of book association was not relevant to any issue in the case." A.79; 597 F.2d at 1206-1207.

The majority also held "that it was proper [for the prosecutor] to ask Giese to read extracts from the book on cross-examination [to rebut Dr. Giese's] evidence of his peaceable character during his own testimony on direct examination." A.27; 597 F.2d at 1185. In the majority's view: "The passages he was asked to read were not hearsay because they were not introduced to prove the truth of the matter asserted (i.e., that violent revolution is a desirable way to bring about social and political change.)" A.43-A.44; 597 F.2d at 1192.

Judge Hufstedler disagreed: "The

contents of the books that a person reads cannot be used as evidence of his peaceable or non-peaceable character. No inference of any kind can be drawn about a person's character from the kinds of books that he reads. We have no basis in human experience to assume that persons of 'good' character confine their reading matter to 'good' books, or that persons who read peaceful books are peaceful people, or that persons who read books involving violence are violent people." A.81; 597 F.2d at 1207. But the basis for Judge Hufstedler's disagreement was even more basic. Quite simply, the prosecutor asked Dr. Giese to read from the book not for impeachment purposes but in an attempt "to prove that Giese adopted the ideas of the book and, acting on those ideas, joined a conspiracy to bomb recruiting center." Id. As Judge Hufstedler observed, the "prosecutor used the contents of this book in the same way in which he used the contents of books describing the manufacture of explosives and explosive devices: namely, to convince the jury that it should attribute the

ideas in the book to the defendants, who thereafter acted upon them to form the conspiracy and to engage in the substantive offenses. This was the very purpose that the prosecutor had announced in his opening statement. The prosecutor had been unable to produce any evidence of any kind that linked Giese with these so-called do-it-yourself manuals. He therefore concentrated his attention on 'Revolution.'" A.80; 597 F.2d at 1207.

Finally, the majority upheld as proper the prosecutor's many misstatements in his closing argument. Conceding "that the prosecution did, in fact, make improper statements on several occasions," and that "the prosecution used some slightly overblown rhetoric in describing From the Movement Toward Revolution," A.59-A.60; 597 F.2d at 1199, the majority nonetheless "conclude[d] that the prosecution's conduct did not amount to plain error." A.62; 597 F.2d at 1199.

Again, Judge Hufstedler disagreed. "Prosecutorial misconduct in argument was extensive in this case." A.88; 597 F.2d at 1210. Here, "we do not have simply a

brief prosecutorial lapse, but a whole series of instances of misconduct." A. 93; 597 F.2d at 1213.

REASONS FOR GRANTING THE WRIT

Petitioner's Conviction of Conspiracy, Premised Upon the Ideas in a Book, on His Forced Reading from the Book and on the Prosecutor's Commentary about the Book, Is Contrary to the Decisions of this Court and Repugnant to the Rights Guaranteed by the First Amendment

Free speech is the "matrix, the indispensable condition, of nearly every other form of freedom." Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967), quoting with approval from Palko v. Connecticut, 302 U.S. 319, 327 (1937).

This indispensable condition was blatantly disregarded by the government here. As summarized by Judge Hufstедler in her dissenting opinion below: "Dr. Giese's conviction for conspiracy must be reversed because it was obtained by patently inadmissible evidence of the contents of the book 'From the Movement Toward Revolution,' which the prosecutor forced Giese to read to the jury after defense counsel's objection to the admission of the book had been overruled.

The prosecutor used the contents of the book to convince the jury that the ideas expressed in the book were Giese's own and that he acted on those ideas to form a conspiracy to blow up recruiting centers. Giese was thus convicted of conspiracy by book association in egregious violation of the guarantees of the First Amendment." A.66; 597 F.2d at 1201.

The issue here does not concern Dr. Giese's publication or dissemination of his writings. If that were the issue, his actions unquestionably would have been protected by the First Amendment. Hess v. Indiana, 414 U.S. 105 (1973); Healy v. James, 408 U.S. 167 (1972); Noto v. United States, 367 U.S. 290 (1961); Herndon v. Lowry, 301 U.S. 242 (1937). Indeed, had he orally or in writing advocated violence, his communication still would have been protected by the First Amendment. Brandenburg v. Ohio, 395 U.S. 444 (1969).

7 Rather, the issue here concerns an even more basic component of the First Amendment's protections: the right to read--without the government being able

to impute to the reader every idea a book may contain.

If Dr. Giese had been a member of a political organization, the government would have violated the First Amendment by imputing the organization's beliefs to him. See Bridges v. Wixon, 326 U.S. 135 (1945). If he had been chairman and chief theoretician of an organization, it also would have been unconstitutional under the First Amendment to impute the organization's beliefs to him. Aptheker v. United States, 378 U.S. 500 (1964). Even if he had authored a document urging unlawful activity, it would have been unconstitutional to convict him for his beliefs. Brandenburg v. Ohio, 395 U.S. 444 (1969); United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

Dr. Giese was in none of these advocacy positions. He simply was a bookstore owner, a university professor, and a reader. Yet the government imputed to him the ideas in a book of which he had only "read snatches." A.42 n.26, A.73; 597 F.2d at 1191 n.26, 1204.

What Dr. Giese had done wrong in the government's view was to read someone else's ideas. Yet, the "right to receive information and ideas, regardless of their social worth is fundamental to our free society." Stanley v. Georgia, 394 U.S. 557, 564 (1969) (citation omitted). And any inference that persons who discuss radical politics (or own books on radical politics) are predisposed to forming conspiracies is constitutionally impermissible. Brandenburg v. Ohio, 395 U.S. 444 (1969); Noto v. United States, 367 U.S. 290 (1961).

Permitting the government to obtain a conviction on the basis of a book that a person has read passages from would wholly eviscerate the protections of the First Amendment. As Judge Hufstedler commented, "[f]reedom of speech would be totally destroyed if the shadow of the prosecutor fell across the pages of the books we read." A.84; 597 F.2d at 1209. The chilling effect from any such prosecutorial shadow would eliminate the First Amendment "right of the public to receive suitable access to social,

political, esthetic, moral, and other ideas." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

Fortunately, the First Amendment does not allow government prosecutors to act in this manner. "If the First Amendment means anything, it is that a [government] has no business telling a man, sitting alone in his house, what books he may read.... Out whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley v. Georgia, 394 U.S. 557, 565 (1969). Stated differently, "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State." Aboud v. Detroit Board of Education, 431 U.S. 209, 234-235 (1977). It is patently unconstitutional for government to attempt to "contract the spheres of available knowledge." Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

Dr. Giese's conviction, based on a book, cannot be allowed to stand. Not only was the conviction obtained in violation of his First Amendment rights but, as Judge Ely commented dissenting from the Ninth Circuit's denial of an en banc hearing, the decision below "constitute[s] an impediment to the intellectual growth of our citizenry." A.94; 597 F.2d at 1213.

### CONCLUSION

For the foregoing reasons, Amicus urges this Court to grant the Petition for Certiorari. Alternatively, we believe this case appropriate for summary reversal.

Dated: New York, New York  
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